No. 87-168

In The
Supreme Court of the United States
October Term, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS

This amicus curiae brief of Pacific Legal Foundation (PLF) is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for appellants and appellees; these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation has extensive experience with the intrusive and oppressive impacts of residential picketing. PLF has represented agricultural employees before the California Agricultural Labor Relations Board, in actions taken as a result of mass labor picketing at these employees' homes. For example labor picketing occurred at Clyde W. Cornell's home in Salinas, California, on Sunday morning, April 29, 1979. Nearly 40 members of the striking United Farm Workers of America marched, screamed, and yelled obscenities in front of Mr. Cornell's home terrifying his family and disrupting the tranquility of the entire neighborhood. Before the demonstration was ended by the police, 13 picketers had been arrested. The administrative and judicial actions taken on behalf of Mr. Cornell by PLF were initiated in the attempt to insure that Mr. Cornell and his family would never again have the privacy and sanctity of their home and neighborhood so flagrantly violated.

PLF strongly believes that municipalities must be permitted to adopt narrowly drawn statutes to protect

their citizens' rights to privacy in their homes. Otherwise, frightening occurrences of picketing in residential neighborhoods will continue needlessly.

The lower court's decision to set aside the residential picketing ordinance of Brookfield, Wisconsin, when there is no constitutional need to allow the picketing, sets a dangerous precedent. PLF considers the lower court's decision to be extremely significant as it interferes with citizens' fundamental right to privacy in the home and overrides the state's compelling interest in protecting that right. The lower court failed to recognize this superseding interest in domestic tranquility; yet past Supreme Court decisions as well as federal and state court decisions have recognized and protected the fundamental right to privacy in the home when confronted with uninvited speech.

The state's compelling need to protect both the right to privacy and the right to free speech is undeniable; yet neither right is absolute. When these rights conflict they must be weighed and balanced by the courts. It is the opinion of amicus curiae that the constitutionally protected privacy right in the home is superseding and was not properly considered or weighed by the District Court. If it had, the court would have ruled the right to privacy in the home so compelling as to sustain Brookfield's residential picketing ordinance. PLF, due to its unique perspective and experience concerning the protection of residential privacy interests, believes that it can provide this Court with a more complete argument on the need to balance the important public interest at stake in this litigation.

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STATEMENT OF THE CASE

This case arises from the Town of Brookfield, Wisconsin's, attempt to protect its residents, adults and children alike, from having their homes picketed.

Between April 20 and May 20, 1985, demonstrators picketed the home of Dr. Benjamin M. Victoria. Dr. Victoria lives in the Black Forest subdivision of Brookfield, a small residential suburb of Milwaukee. Considerable business and commercial development is clustered along one major highway running through town and the remainder of town is residential like the Black Forest subdivision. The picketing created significant unrest in Brookfield. For the local residents to think that their homes could be invaded by strangers patrolling or posting themselves in front of their homes was alarming. As a result an ordinance was passed which stated "it is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The constitutionality of this ordinance is the subject of this case. The appellees filed a complaint in federal District Court arguing that their free speech rights under the First and Fourteenth Amendments of the United States Constitution were being deprived. The ordinance now comes before the Supreme Court having been invalidated by the District Court, and affirmed by the Circuit Court, as likely to fail the test of a constitutional time, place, and manner regulation of speech.

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SUMMARY OF ARGUMENT

The judgment of the Seventh Circuit Court of Appeals should be overturned for the following reasons:

1. The protection of the right of privacy in the home should be assigned superseding importance when evaluating the constitutionality of Brookfield's residential picketing ordinance.

2. Application of the correct test demonstrates that the Brookfield residential picketing ordinance is a constitutional time, place, and manner regulation of speech.

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ARGUMENT

I

THE COURT SHOULD ASSIGN SUPERSEDING IMPORTANCE TO THE PROTECTION OF PRIVACY IN THE HOME

> "Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974).

Moreover,

> "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public

> library . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

These principles demonstrate the totally inappropriate nature of picketing around someone's home. The patterns of a residential neighborhood's normal activity are incompatible with picketing. The scenes are varied but each demands similar attributes—security and privacy from unfriendly intrusions. Picture three or four young girls playing with their dolls, pushing them along the streets in their buggies; picture a young mother walking her newborn child; picture a father and son playing catch in the front yard, or even the neighborhood kids playing a game of baseball on the street in front of their homes. Then erase these pictures from sight, for when a band of picketers enters a neighborhood there is no room for anyone else. Little girls will be hurried inside by their frightened parents. New mothers will seek refuge away from the picketers taking up a menacing watch over some neighbor's home. No kids will be found in the streets because their haven, their last retreat, has been taken over.

Make no mistake, the picketers intend this result for it is more than words they wish to convey—their message is intimidation no matter how peaceful they may superficially appear. Their purpose is to communicate that until their subject repents or recants that he or she and all those around will have to live with constant concern. This result is argued by plaintiffs to be protected by the First Amendment. To the contrary the framers of the

Constitution never intended the right of free speech as a weapon of harassment or intimidation of individuals in the very privacy of their own homes.

Privacy in the home constitutes a compelling state interest which only the state through the exercise of its police power has the capability of ensuring. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Brookfield, Wisconsin, recognized its heavy responsibility and indeed duty. It recognized that picketing around homes is an oppressive, emotionally disturbing form of conduct which deprives a residential area of its feeling of well-being and privacy. Brookfield did the only thing it could responsibly do under these circumstances; it prohibited all picketing before or about homes within its jurisdiction. Nevertheless the District Court struck down Brookfield's attempt to protect its residents and the Circuit Court affirmed, ruling in effect that at all times privacy in the home must be subordinated to the right of picketers to invade the tranquility of the home environment. In the words of the District Court, "[a]n absolute ban . . . against a form of protected speech [residential picketing] cannot be permitted to stand." *Schultz v. Frisby*, 619 F. Supp. 792, 797 (E.D. Wis. 1985).

Yet this Court stated in *United States v. Grace*, 461 U.S. 171, 177 (1983), "[w]e have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" Quoting *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). The District Court's absolutist approach fails to recognize that speech coupled with conduct such as picketing can indeed be limited, and in some circumstances banned altogether as

to a particular location. *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 651-52 (1981); *Bakery and Pastry Drivers v. Wohl,* 315 U.S. 769 (1942). It is imperative that the District Court's analysis be corrected.

The state must be permitted to exercise its duty to protect the residential privacy of its citizens, because without safeguarding statutes a citizen can and will be subjected to the true horrors of residential picketing, for its purpose is not just to educate or simply communicate, but to harass, intimidate, and embarrass. The right of privacy in the home is so cherished and fundamental to a free and democratic society that on balance there is no justification to exalt picketing under the guise of free speech to a protected, unassailable status. When weighed against the right to have a safe and private home, the right to picket pales in constitutional importance and can be seen in its true light—not as a tool to express and communicate ideas but as a weapon of injustice.

The right to be free from invasion of privacy encompasses the right to have one's home, family, and personal life protected from disruption. A clear line of case authority demonstrates that the privacy and sanctity of the home are to be given the highest safeguards against intrusive speech in a variety of factual settings.

In *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970), this Court upheld the constitutionality of a federal statute which permitted a resident to have his name removed from mailing lists thereby prohibiting mail houses from sending mailings to the resident's home if the subject matter of the mailings was found by the resident

to be sexually offensive. Chief Justice Burger stated in his opinion:

> "Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan,* 397 U.S. at 736-37.

In explaining his opinion the Chief Justice continued:

> "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.
>
> . . .
>
> "We therefore categorically reject the argument at a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Rowan,* 397 U.S. at 737-38.

In an earlier case, *Kovacs v. Cooper, supra,* this Court upheld an ordinance prohibiting the use of sound trucks emitting "loud and raucous noises," reasoning that a person in his home or even in the street is particularly helpless to escape interference with his privacy except through protection of the municipality. *Kovacs,* 336 U.S. at 87.

In addition, the Court stated:

> "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within the constitutional limitations, to protect the well-being and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people." *Kovacs*, 336 U.S. at 83.

In *Breard v. Alexandria*, 341 U.S. 622, 625-26 (1951), this Court, in upholding a municipal ordinance regulating door-to-door magazine solicitations at private residences, retained this rationale, noting

> "that opportunists . . . cannot be permitted to arm themselves with an acceptable principle, such as . . . a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose."

In commenting on the effects of unregulated picketing, Justice Black in his concurring opinion in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), emphasized that the family home should be protected:

> "And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desire to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory*, 394 U.S. at 125-26.

Many other federal and state decisions also have determined residential picketing to be disruptive of the feelings of well-being and privacy that one is entitled to enjoy in his home and, thus, subject to prohibition or regulation. These cases have held that regulation is not an infringement of the First Amendment right to free speech in that the restriction of picketing and concomitant speech is in furtherance of a legitimate, substantial, and compelling state interest—protection of the right of privacy. *See City of Wauwatosa v. King*, 49 Wis. 2d 38, 182 N.W.2d 530 (1971); *State v. Zanker*, 179 Minn. 355, 356, 299 N.W. 311 (1930); *State v. Perry*, 196 Minn. 481, 482, 265 N.W. 302 (1936); *Pipe Machinery Co. v. De More*, 76 N.E.2d 725, 727 (1947); *Hebrew v. Davis*, 38 Misc. 2d 173, 177-78, 235 N.Y.S.2d 318, 323-24 (1962); *Garcia v. Gray*, 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

Picketing is completely incompatible with the home environment. As established by these cases, the right of privacy in the home may be protected from intrusive and disruptive speech through the regulatory efforts of states and municipalities. The District Court, however, failed to assign to Brookfield's residential picketing ordinance the proper constitutional weight, a superseding weight for protecting privacy in the home. It instead assigned to "picketing" a constitutional preeminence found neither in case law nor the Constitution itself.

II

EVEN IF THE STREETS OF BROOKFIELD'S BLACK FOREST SUBDIVISION WERE CONSIDERED A PUBLIC FORUM, BROOKFIELD'S ORDINANCE BANNING RESIDENTIAL PICKETING IS A CONSTITUTIONAL TIME, PLACE, AND MANNER REGULATION OF SPEECH

The lanes and byways of Brookfield's Black Forest subdivision are only 30 feet wide. They have no lighting and are not bordered by sidewalks. There is no evidence that they have ever been reserved much less used for picketing purposes.[1] Picketing on these narrow lanes would be unsafe and a clear infringement on residential tranquility. Under these circumstances, forbidding residential picketing is constitutionally valid as long as the ordinance is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 46 (1983). This standard is easily met by Brookfield's ordinance but amicus urges the Court to recognize that Brookfield's ordinance also stands even under much stricter standards. Even if the Black Forest subdivision's streets were wide enough so that picketing did not conflict with safe traffic, and even if there were lighting and sidewalks along the streets, Brookfield's ordinance is constitutional as a reasonable time, place, and manner restriction on speech.

There is no question that the state can impose content-neutral regulations of time, place, and manner on speech

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[1] Except for the April and May picketing which precipitated the ordinance.

as long as the regulations serve a legitimate state interest, are narrowly tailored, and leave open ample alternative channels of communication. *Perry,* 460 U.S. at 45. Also beyond question is the character of Brookfield's ordinance. It is not content based because it unequivocally restricts all residential picketing regardless of the message of the picketers. Brookfield's ordinance also meets the test of constitutional validity because it: (1) serves a legitimate state interest, (2) is narrowly tailored to meet that interest, and (3) leaves open ample alternative channels of communication.

A. Protection of Residential Privacy Standing Alone Is a Legitimate State Interest

Brookfield clearly articulated that the interests it wanted to protect were both public safety of those using its streets and the peace, privacy, and security of its citizens when at home. *See* Town of Brookfield General Code § 9.17.

This Court has long held that the state has a legitimate interest in regulating expressive conduct that interferes with the safe or orderly use of public streets. *Cox v. Louisiana,* 379 U.S. 536 (1965). But Brookfield's interest in protecting the privacy of its citizens while at home is alone more than adequate to satisfy the legitimate state interest prong of the *Perry* test. Indeed privacy in the home constitutes a compelling state interest of superseding importance. *See* Argument I, *supra.*

As already recognized by this Court, within the context of one's home, "the individual's right to be left alone

plainly outweighs the First Amendment Rights of an intruder." *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978). There can be no doubt of the legitimate interest Brookfield sought to protect.

B. The Brookfield Ordinance Is Narrowly Tailored to Meet Its Interest in Protecting Residential Privacy

The District Court erred in determining that the ordinance was not narrowly tailored. In so deciding the lower court suggested that means less restrictive of the picketers' conduct were available to the town, such as limiting the time of picketing, or the number of picketers, or the season of picketing. *Schultz*, 619 F. Supp. at 797. But the District Court misconstrued the proper test, for a content-neutral regulation is narrowly drawn if it "responds precisely to the substantive problem which legitimately concerns the City." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). *See also United States v. Albertini*, 472 U.S. 675 (1985); *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 89 L. Ed. 2d 29 (1986). The substantive problem Brookfield is attempting to curtail is picketing around its citizens' homes. Limiting the time or season for picketing, or number of picketers, will not cure the substantive problem. That problem is picketing,[2] for picketing is at times terrifying and always intimidating and harassing.

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[2] "The verb 'picket' is a commonly understood, widely used term describing the conduct of one who patrols an area or stations himself at a place bearing some insignia or sign designed to persuade or protest." *Simpson v. Municipal Court*, 14 Cal. App.3d 591, 92 Cal. Rptr. 417 (1971). *See also Hughes v. Superior Court of California*, 339 U.S. 460, 464-65 (1950). Many forms of communication, including expressive conduct, fall outside of the recognized, specific conduct described as picketing.

The problem is the presence of even one individual, an unwelcome visitor to your home, who you know is not there for your benefit, but quite the contrary, to protest, harass, frighten, and intimidate.

> "'[T]o those inside . . . the home becomes something less than a home when and while the picketing . . . continue(s) . . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.'" *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting (quoting *City of Wauwatosa v. King*, 49 Wis. 2d 398, 411-12, 182 N.W.2d 530, 537 (1971)).

Picketing is a manner of expression which is completely incompatible with the normal activity of a peaceful residential area, an area commonly teaming with communal activity such as busy tots playing, and family members coming and going. The problem faced by Brookfield was the posting of menacing individuals who were strangers to the families in the neighborhood. The *only* way to cure the problem is to prohibit it. That is what Brookfield did, and under *City Council v. Taxpayers for Vincent*, *supra*, such a response is narrowly tailored to serve the legitimate interest in protecting residential privacy.

C. Brookfield's Ordinance Left Open Ample Alternative Channels of Communication Even Within the Black Forest Residential Community

The District Court correctly found that Brookfield's ordinance allows for ample alternative channels of communication. This finding is supported by the record.

Unfortunately the District Court's overriding belief that "[a]n absolute ban . . . against a form of speech (here residential picketing), cannot be permitted to stand," *Schultz v. Frisby,* 619 F. Supp. 792, 797 (E.D. Wis. 1985), tainted its thinking and decision.

The District Court reached the wrong result but did make some salient observations. When addressing the term "ample alternative channels," the court emphasized that it should not be asked to assess whether alternative channels for plaintiffs' speech must be equally effective, so that plaintiffs are still able "to stir up the . . . family, the family's neighbors, the town . . . and allow plaintiffs to garner as much publicity, as they would by home picketing." *Id.* at 797. If this were the test there would seldom be ample alternative channels because "[p]icketing subject to legal challenge will almost always attract more media attention" than other channels of communication. *Id.* "Thus, if an alternative channel must be ample in the sense that it affords the same publicity to speech as does the challenged channel, the speech which intrudes on people's privacy and is more outrageous (and therefore, unfortunately, more newsworthy) will be . . . more likely to receive the protection of the First Amendment." *Id.* This fortunately is not the standard for "ample alternative channels." Nowhere has this Court ruled that communicators are owed under the First Amendment the privilege of forcing others to receive their message with the same coercive, intimidating force as through picketing.

Plaintiffs herein had more than ample alternative methods to communicate in the Town of Brookfield their displeasure with Dr. Victoria's conduct. They could have

distributed leaflets to the neighbors, they could have marched past the Victorias' home, they could have advertised on the radio or television or in the newspaper, they could have even picketed the public, commercial areas of Brookfield.[3] *Id.* at 797. Each of these methods provides plaintiffs access to many listeners including the media to express their concerns. Likewise, and unlike picketing, each of these methods also allows the listeners whom plaintiffs seek to reach, the right to turn off the message at any time. *Rowan; Kovacs.* The constitution demands no more and no less.

CONCLUSION

The right to privacy in one's home is of superseding importance and at times outweighs other constitutional protections. Picketing is incompatible with the normal activities of a neighborhood, and when ample alternative channels for presenting a message are available, it is not the security and privacy of a home that must give way, but the picketing. The Town of Brookfield was faced with this conflict and it struck the constitutionally correct balance. Its ordinance forbidding picketing must be upheld.

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[3] The ordinance which is attacked not as it is applied but facially prohibits only "picketing," not other ample means of communication within Black Forest itself. (See definition of picketing, *infra* at Footnote No. 2.) Thus a claim that the statute could be overbroad in its application would not stand because "it has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973)." *Virginia v. American Booksellers Association,* — U.S. —, 56 U.S.L.W. 4113, 4117 (January 25, 1988).

For these reasons, this Court should set aside the decision of the District Court as affirmed by the Seventh Circuit Court of Appeals.

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Respectfully submitted,

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